

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

In the Matter of)	MB Docket No. 08-214
)	
Herring Broadcasting, Inc. d/b/a WealthTV,)	File No. CSR-7709-P
Complainant)	
v.)	
Time Warner Cable Inc.)	
Defendant)	
)	
Herring Broadcasting, Inc. d/b/a WealthTV,)	File No. CSR-7822-P
Complainant)	
v.)	
Bright House Networks, LLC,)	
Defendant)	
)	
Herring Broadcasting, Inc. d/b/a WealthTV,)	File No. CSR-7829-P
Complainant)	
v.)	
Cox Communications, Inc.,)	
Defendant)	
)	
Herring Broadcasting, Inc. d/b/a WealthTV,)	File No. CSR-7907-P
Complainant)	
v.)	
Comcast Corporation,)	
Defendant)	
)	

To: Marlene H. Dortch, Secretary, Federal Communications Commission
Attn: The Hon. Richard L. Sippel – Chief Administrative Law Judge

March 6, 2009

DEFENDANTS' OPPOSITION TO MOTION TO COMPEL

Pursuant to 47 C.F.R. § 1.325, Defendants Cox Communications, Inc. (“Cox”),
Time Warner Cable Inc. (“TWC”), Comcast Corporation, and Bright House Networks,

LLC (the “Defendants”), hereby oppose the motion to compel filed by Complainant Herring Broadcasting, Inc. d/b/a WealthTV (“WealthTV”) on March 2, 2009.¹

WealthTV raises four issues, only one of which is ripe for decision – whether Defendants should be compelled to produce agreements and related documents for Versus, The Outdoor Channel, E!, and Style. There is no validity to WealthTV’s motion to compel, as shown below. The other three issues WealthTV raises only “protectively.” These are addressed very briefly, but Defendants will address them more fully if they ever become ripe for decision.

I. Documents Related To Versus, The Outdoor Channel, E! and Style Are Plainly Irrelevant And Unnecessary In Light Of WealthTV’s Request for Documents Related To Relevant Networks.

WealthTV’s Request 4 seeks affiliation agreements and other documents relating to the terms and conditions of carriage for INHD, MOJO, Versus, The Outdoor Channel, E!, and Style, and Request 3 seeks a very broad range of documents relating to the decision to develop, launch or carry these networks.² Defendants produced agreements and related documents relating to INHD/MOJO but continue to object to producing documents for Versus, The Outdoor Channel, E!, and Style. As discussed below, these documents are irrelevant and unnecessary, and production would be unduly burdensome.

The lack of relevance of these documents is plain from the very language of WealthTV’s complaints. The only count in each of WealthTV’s complaints alleges that Defendants violated 47 C.F.R. § 76.1301(c) because each Defendant allegedly “has refused carriage to WealthTV, an independent programming service, and granted carriage

¹ In all material respects, the disputes addressed in this opposition between Defendants and WealthTV are the same except as otherwise noted.

to its affiliate MOJO, a substantially similar programming service.”³ WealthTV’s Complaints raise no discrimination allegation with regard to Versus, The Outdoor Channel, E!, or Style.

Furthermore, it is clear that WealthTV’s Requests 3 and 4 were premised on the erroneous assumption that Versus, The Outdoor Channel, E!, and Style were “affiliated” with Defendants. That is simply not true for Time Warner, Cox and Bright House, and it is not true for Comcast with respect to The Outdoor Channel. Defendants pointed this out to WealthTV in their objections to the Requests, when Defendants agreed to produce documents relating to INHD/MOJO. Nonetheless, Wealth TV still insists on obtaining these additional documents.

WealthTV asserts that documents regarding Versus, The Outdoor Channel, E!, and Style are relevant for “what they may reveal” about how Defendants make programming decisions and the terms on which carriage is offered. This is illogical. Documents relating to these four networks are fundamentally immaterial since each Defendant first executed a carriage agreement with each of these networks many years before WealthTV even existed and (obviously) years before the INHD network was rebranded as MOJO.⁴

² See Complainant’s First Request for Production of Documents to Defendant Cox Communications, Inc., Requests 3 & 4.

³ Complaint, *Herring Broad., Inc. v. Cox Commc’ns, Inc.*, File No. CSR-7829-P, at ¶ 49; see also Complaint, *Herring Broad., Inc. v. Comcast Corp.*, File No. CSR-7907-P, at ¶ 44 (“[I]nsofar as Comcast has refused carriage to WealthTV, an independent programming service, and granted carriage to its affiliate MOJO, a substantially similar programming service, Comcast has violated Section 76.1301(c).”).

⁴ Versus launched as “Outdoor Life Network” in July 1995; The Outdoor Channel launched in April 1993; E! Entertainment Television launched in July 1987 as Movietime and became E! in June 1990; and The Style Network was launched in October 1998. See Nat’l Cable & Telecom. Ass’n. *Cable Industry Section, Organizations, Cable Networks*,

Indeed, both the affiliation agreements themselves (Request 4) and the documents related to the development and launch of these networks (Request 3) necessarily fall outside the scope of WealthTV's Document Requests, which provide: "Unless otherwise specified, the time frame for each request shall be January 1, 2004 to and including the present."⁵

Even more important, however, is the fact that carriage decisions made so long ago (in some cases decades ago) cannot shed light on the reasons for the decisions not to carry WealthTV when INHD was rebranded as MOJO in June 2007.⁶ For example, WealthTV says it wants to argue that Defendants' carriage decisions regarding WealthTV in 2007 were based on the intent to save space on Defendants' systems for their own affiliated networks, rather than on legitimate business considerations such as assessments of the proposed networks and other criteria. While some *recent* agreements for the launch of unaffiliated programming might shed light on that issue, carriage decisions dating back more than a decade – and the innumerable documents that might relate to such old decisions – shed no light on these issues at all. Unless this proceeding for some reason is going to consider the hundreds of affiliation agreements executed throughout

at <http://www.ncta.com/Organizationtype/CableNetwork/3635.aspx>, <http://www.ncta.com/Organizationtype/CableNetwork/1494.aspx>, <http://www.ncta.com/Organizationtype/CableNetwork/1440.aspx>, and <http://www.ncta.com/Organizationtype/CableNetwork/1601.aspx> (last visited Mar. 5, 2009). And each Defendant launched these channels long ago. As a representative example, TWC launched E! (then Movietime) in 1988, Style in 1999, The Outdoor Channel in 1998, and Versus in 2002.

⁵ See Complainant's First Request for Production of Documents to Defendant Comcast Communications, Inc., Definitions and Instructions No. 23, at 7.

⁶ In this regard, documents regarding decisions to renew long-standing networks like Versus, The Outdoor Channel, E!, and Style do not reach issues raised in WealthTV's complaints.

the long-term historical development of Defendants' programming decisions, only recent agreements are relevant. Any more expansive approach would be inconsistent with the rulings in this hearing, which are intended to constrain, not unleash, burdensome and irrelevant discovery.⁷

WealthTV knows full well that recent carriage agreements are the relevant inquiry and has already requested such documents in its Document Request 8, concerning agreements with unaffiliated networks entered into between June 1, 2007 and the present. Defendants do not dispute that recent carriage agreements with at least some unaffiliated networks – executed during the relevant period between June 2007 and the dates of the Complaints – might be relevant to WealthTV's theory of the case. Indeed, Defendants are currently working with WealthTV to provide such documents. Defendants have already provided a list of such networks in response to Request 8 as part of the on-going negotiation. It is through this process that relevant carriage agreements should be produced, not through a misguided demand for long-established agreements with unaffiliated networks.

⁷ See Hearing Transcript, *In re Herring Broad., Inc. d/b/a WealthTV*, MB Docket No. 08-214, (Nov. 25, 2008), at 104 (“[T]hat’s where I intend to be tight, not expansive discovery, very focused discovery on a tight schedule.”). In fact, apart from the affiliation agreements themselves, production of all documents relating to the negotiation of those agreements and the development and launch of these old networks would be extraordinarily burdensome. Each Defendant would have to conduct a review and production far greater in magnitude than the production WealthTV has had to conduct. Each Defendant would have to search files, both physical and electronic, throughout its programming and perhaps other departments to find all of the back and forth for each network. Defendants do not have one central file that would contain all of the relevant documents, just as WealthTV did not. The burden would be great and inconsistent with the limited discovery ordered in this case. Defendants could not realistically accomplish this scale of production within the tight deadlines in this expedited proceeding.

It is also important to note that WealthTV's demand for agreements with Versus, The Outdoor Channel, E!, and Style cannot be equated with Defendants' request for WealthTV's affiliation agreements and documents showing why other MVPDs have declined to carry WealthTV. WealthTV is the complainant here, and its own affiliation agreements will show what it actually received for carriage during the relevant period. This is directly relevant to liability and remedy. The same is true for documents showing why other MVPDs have *declined* to carry WealthTV because they will show that many other MVPDs refused carriage for perfectly legitimate business reasons, not based on affiliation with other networks. These are indisputably relevant and material to liability and remedy. Unlike WealthTV, Defendants are not demanding irrelevant, old contracts.

Finally, faced with the fundamental problems and errors inherent in its efforts to force Defendants to produce documents related to Versus, The Outdoor Channel, E!, and Style, WealthTV has suggested an entirely new theory of liability with no legal basis whatsoever. Specifically, WealthTV asserts that the requested documents could show that some Defendants might be discriminating against WealthTV, not in favor of "affiliated programming" but in favor of programming offered by third parties with whom some Defendants might have had some "prior business relationship." This theory is entirely novel and finds no support in the language of the statute,⁸ the allegations

⁸ See 47 C.F.R. § 76.1301(c) (applying to discrimination "in video programming distribution on the basis of *affiliation* or *non-affiliation*." (emphasis added)). See also *In the Matter of Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Time Warner Inc., and its subsidiaries, Assignor/Transferor to Time Warner Cable Inc., and its subsidiaries, Assignee/Transferee*, Mem. Opin. and Order, DA 09-73, ¶ 21 (rel. Feb. 11, 2009) (finding that after Time Warner Cable is spun-off from Time Warner Inc., the Time Warner Inc. programming networks will no longer be "affiliated" with Time Warner Cable for purposes of the FCC program access or program carriage rules, despite the prior relationship of these companies).

contained in WealthTV's Complaints, or the Media Bureau's *Hearing Designation Order*.⁹ Having learned that no Defendants are affiliated with The Outdoor Channel and that three Defendants are not affiliated with any of the four networks, WealthTV floats a new theory that perhaps there has been some other type of discrimination, not covered by the statute. This unfounded and expansive theory cannot form the basis for otherwise irrelevant discovery and cannot render these documents relevant because the decision to launch these networks was made too long ago to be of any significance.

Frankly, it is unclear why WealthTV is sticking to its guns on this demand. WealthTV's argument that it wants the documents for "what they may reveal" and its introduction of new theories of liability certainly suggests that WealthTV is engaged in a "fishing expedition" rather than the limited and targeted discovery authorized in this proceeding.¹⁰ Its attempt to equate this demand with Defendants' request for a fair sampling of WealthTV's affiliation agreements also suggests this may simply be intended as a bargaining chip. In any event, there is no basis for it, and it should be rejected.¹¹

⁹ *Herring Broad., Inc. d/b/a WealthTV v. Time Warner Cable Inc. et al.*, 23 FCC Rcd 14787 (MB 2008).

¹⁰ *See supra* n.7.

¹¹ *See, e.g., Collens v. City of New York*, 222 F.R.D. 249, 253 (S.D.N.Y. 2004) ("courts should not grant discovery requests based on pure speculation that amount to nothing more than a 'fishing expedition' into actions . . . not related to the alleged claims or defenses."). We also note that while WealthTV's motion is timely, it was filed on the last possible day, even though the issue was clearly disputed several weeks ago. In contrast, Defendants filed a motion to compel on February 9, 2009, as soon as it knew WealthTV refused to produce its affiliation agreements (except two self-selected agreements) or documents relating to MVPDs that had refused to carry WealthTV. Defendants moved quickly because they needed those critical documents as soon as possible. There is no explanation for WealthTV delaying and then making extraordinary demands that would necessitate more delay. After all, WealthTV is the party that claimed it needed no discovery at all and was prepared for trial months ago.

In short, documents relating to Versus, The Outdoor Channel, E!, and Style have no relevance to this case, and they certainly are not “fundamental to WealthTV’s proofs.” The motion to compel these documents should be denied.

II. The Issues Raised “Protectively” Should Not Be Decided Now.

WealthTV raises three other issues only protectively, presumably to reserve its rights in the event the parties do not reach agreement. We address these very briefly.

Request 1: WealthTV wants Defendants to conduct nationwide searches for documents that might show contacts between WealthTV and each Defendant. While Defendants are attempting to work with WealthTV on this, WealthTV’s demand is entirely unreasonable. WealthTV initially refused to provide *any* list of the individuals for whom it wanted Defendants to search, and then finally provided lists on Sunday, March 1, 2009, that contain approximately *340 individuals*! Even a cursory review of the list reveals that many (if not most) of the names do not represent individuals with whom WealthTV had any actual meetings at all.

While Defendants appreciate that WealthTV has acknowledged the tardiness of its lists, the fact remains that compliance at this very late stage would delay the proceedings. Accordingly, Defendants will continue to work with WealthTV to resolve this issue by identifying a reasonable number of people to search, without judicial involvement, but Defendants must reserve their right to oppose any final demand made by WealthTV.

Request 8: As noted above, the parties are negotiating the scope of the disclosure of carriage agreements in response to Request 8. Defendants have already provided (at WealthTV’s request) a list of general entertainment networks launched during the

relevant period between June 1, 2007 and March 27, 2008 as part of that negotiation.

Defendants reserve their right to oppose any final demand made by WealthTV.

Redactions: WealthTV complains that Cox and Bright House redacted certain text from documents on the ground that it was completely irrelevant to the proceedings.

What WealthTV fails to inform the Presiding Judge, however, is that WealthTV did exactly the same thing – and without supplying any information or justification.

Attached as Exhibit A is an example of a document WealthTV produced to Cox with intermittent redactions throughout a series of emails, which did not involve legal counsel, and which includes an entire redacted page. These redactions are unexplained. This is precisely what WealthTV claims no party should ever do.

In addition, as counsel has explained, the redacted material is non-responsive to any request but is highly sensitive competitive, financial and business planning information. As such, Cox and Bright House believe they are entitled to redact that information from the documents produced just as, for example, attorney-client communications might be redacted from a document that otherwise was responsive. Moreover, these redactions are consistent with the objections to WealthTV's document requests that were served on WealthTV's counsel in December.

Nevertheless, this, too, is an issue the parties can and should resolve themselves. Cox and Bright House both in fact did provide explanations to WealthTV for the redactions they made; and Bright House agreed to produce – and did produce, unredacted – one document about which WealthTV's counsel had made an issue. We ask WealthTV to explain its redactions as well, or to provide unredacted documents. Defendants are

confident that this can be resolved without further judicial involvement, but reserve their rights in the event it cannot.

WHEREFORE, Defendants respectfully request that the Motion to Compel be denied in its entirety.

Respectfully submitted,

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Dated: March 6, 2009

EXHIBIT A

Charles Herring

From: Charles Herring [charles.herring@wealthtv.net]
Sent: Thursday, August 02, 2007 11:22 AM
To: 'robert herring'
Cc: 'bobby.herring@wealthtv.net'
Subject: RE: Up Date?

Dad:

Donna - Tried with Donna, but she wasn't very smart.

Bank - Dropped off a check for \$5k at bank to get appraisal going. Tom said the appraisal would be the slowest item.

Checks ordered.

BlueCross insurance deductions was a mess. The WealthTV policy as I have been able to gather is to reimburse for the first \$250.00/mo for MEDICAL insurance. Most single people will get their insurance for free or near free. Others will need to contribute. Implementing deductions from the employees will save us \$98,202 per year.

EchoStar - Spoke with Jedd on Tuesday night. He confirmed per Bill that Echostar yanked all of Turner's channels, consistent with the info received from Rick Howe of Ensequence. Jedd stated that The Turner Media Group terminated about 20 of its 28 employees in the Denver area. New channel ads are all shopping channels per Jedd. Apparently TWO of the shopping channels have already defaulted on PAYMENT. I asked Jedd if there was an oppty to continue negotiation with Bill/Mike. Jedd thought no for now. I asked if there were any hurt feelings with Bill or Mike. He said that Bill had no hurt feelings, might even be a little embarrassed that a deal was not concluded. Jedd went on to talk about how Mike Kelly per Bill is very unstable. Jedd didn't think Kelly had any hurt feelings.

Jedd suggests visited with Eric Sahl. I would like to get Eric to lunch and try to mend what I can. Don't know if it is possible, but will wait for your direction.

NCTC - Jedd sent to Jeff with a very nice cover email letter.

Cablevision - Tony is on vacation until Friday.

Time Warner - There was an announcement that MOJO would be providing 5 hours of HD VOD starting August 1. The announcement said that Time Warner would be the first MSO to carry and across all systems.
Talk about BULLSHIT!

Redacted

Verizon - Verizon wants HD VOD. Plans to launch to friendlies ASAP with launch across Massachusetts customer base in a month or two. I'm sending a drive today.

Regarding leasing down stairs, who should I call for a status/progress?

Hope all is well.

Charles

-----Original Message-----

From: robert herring [mailto:herringrobert@mac.com]
Sent: Wednesday, August 01, 2007 5:20 PM
To: Charles Herring
Subject: RE: Up Date?

Redacted

How is everything?
I guess my Donna Idea sucked.
let Joost provide answers to Bank.\\

Dad

Iti is 2 :30 here

On Wednesday, August 01, 2007, at 03:26PM, "Charles Herring" <charles.herring@wealthtv.net> wrote:

Redacted

>Charles
>
>-----Original Message-----
>From: robert herring [mailto:herringrobert@mac.com]
>Sent: Wednesday, August 01, 2007 11:24 AM
>To: Charles Herring
>Subject: RE: Up Date?
>
>

Redacted

>
>
>
>
>On Wednesday, August 01, 2007, at 09:44AM, "Charles Herring"
><charles.herring@wealthtv.net> wrote:
>>Dad:

Redacted

>>Charles
>>
>>-----Original Message-----
>>From: robert herring [mailto:herringrobert@mac.com]
>>Sent: Tuesday, July 31, 2007 4:46 PM
>>To: Seth BoBroff
>>Cc: Charles Herring
>>Subject: Up Date?
>>
>> Seth,
>
>
>CarR
>>

Redacted

Redacted

CERTIFICATE OF SERVICE

I, Jason E. Rademacher, hereby certify that copies of the foregoing "Defendants' Opposition to Motion to Compel" were served this 6th day of March, 2009, via email upon the following:

The Honorable Richard L. Sippel
Chief Administrative Law Judge
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

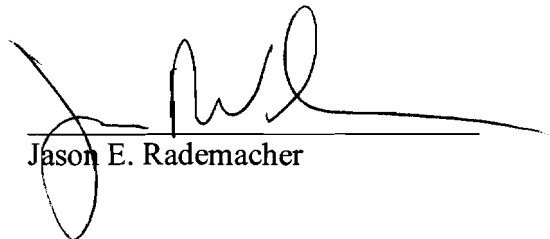
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